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No. 87-470

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,
*Petitioner,*

v.

STATE OF INDIANA, *et al.*,
*Respondents.*

**On Writ of Certiorari to the Supreme Court of Indiana**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PHE, INC. IN SUPPORT OF PETITIONER

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May 12, 1988

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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PHE, Inc. ("PHE") hereby respectfully moves for leave to file the attached brief *amicus curiae.* The attorney for petitioner has consented; the attorney for respondents has refused consent.

PHE is a North Carolina corporation engaged in the business of mailing throughout the nation various materials protected by the First Amendment, including sexually explicit magazines and videotapes, contraceptives, a medical newsletter entitled *Sex Over Forty* (which is edited by a physician), and a newspaper entitled *Executive Health Report.* PHE's sexually explicit speech is sent only to adults, and only upon request.

PHE has taken great care to assure compliance with state and federal obscenity laws. In addition to conduct-

ing rigorous multiple internal review procedures that include review of sexually explicit materials by independent psychologists and sociologists, the company has met with law enforcement officials and sought their advice to ensure that no arguably obscene material is distributed by PHE. PHE has strictly abided by the advice it has received.

Despite these efforts, on August 4, 1986, PHE was indicted in Alamance County, North Carolina for the distribution of videotapes and magazines that had been cleared for distribution by attorneys and law enforcement officials in Orange County, North Carolina (PHE's principal place of business). At trial, a government witness admitted that the materials at issue entered Alamance County only after a law enforcement official obtained a post office box there and requested those materials. After less than an hour of deliberation, the jury acquitted PHE of all charges.

Notwithstanding the jury's verdict in this state prosecution, federal prosecutors in North Carolina and Utah have informed PHE that prosecution of PHE under federal obscenity laws is under serious consideration. PHE has substantial reason to believe that this prosecution will include counts based on the federal RICO statute. In pre-indictment negotiations, federal prosecutors in Utah have insisted that to avoid prosecution on felony charges, PHE must discontinue nationwide sale of any sexually oriented material, even of material protected by the First Amendment. Additionally, PHE's nationwide distribution includes mailings to Indiana that may subject PHE to direct application of Indiana's RICO statute.

In a federal RICO prosecution, PHE's entire business could be forfeited if PHE is found to have distributed two or more vidoeotapes or magazines that were obscene in any community in the United States during the past ten years. Similarly, PHE might be subject to forfeiture under Indiana's RICO statute because it distributed in Indiana two video tapes found obscene under Indiana law. The risk of this draconian forfeiture sanction creates extreme pressure on PHE to accede to the demands of state and federal prosecutors and severely curtail its speech activities in all communities, despite PHE's efforts to ensure that all of the materials it distributes are nonobscene, and thus constitutionally protected.

PHE's experience has made it acutely aware of the threat to free expression posed by application of state and federal RICO statutes to expressive activities. As applied to speech crimes such as obscenity, these statutes—which employ "new weapons of unprecedented scope" in order to eradicate the targets of RICO prosecutions, *Russello v. United States*, 464 U.S. 16, 27 (1983)—are fundamentally at odds with the guarantees of the First Amendment. Many of the constitutional issues raised by petitioner's challenge to the Indiana RICO statute will have a direct bearing on the constitutionality of the federal government's use of the federal RICO Act to regulate obscenity. PHE has a direct and continuing interest in ensuring that both the Indiana RICO statute and its federal counterpart are interpreted and applied consistently with First Amendment guarantees.

PHE wishes to participate in this case to explain the constitutional infirmities of the Indiana RICO statute from the perspective of a national distributor. PHE also wishes to focus on a fundamental question that was squarely raised but not fully addressed in the petition for certiorari, and thus may not be fully considered in the briefs on the merits: the extent to which the First Amendment prohibits forfeiture of a speech establishment's assets based solely on a finding that some past expressive activities of that establishment have violated obscenity laws.

For the foregoing reasons, PHE respectfully urges the Court to accept and file the enclosed brief *amicus curiae.*

Respectfully submitted,

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## BRIEF AMICUS CURIAE OF PHE, INC. IN SUPPORT OF PETITIONER

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### INTEREST OF AMICUS

The interest of PHE is described in the accompanying Motion For Leave To File Brief *Amicus Curiae*.

### INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents novel First Amendment questions of surpassing importance. At issue is the constitutionality of the State of Indiana's use of its Racketeer Influenced and Corrupt Organizations Act, Ind. Code § 35-45-6-1 *et seq.* ("RICO"), and the companion Civil Remedies for Racketeering Activity statute, Ind. Code § 34-4-30.5-1 *et seq.* ("CRRA"), to suppress presumptively protected expression. Petitioner challenges this statutory scheme (hereafter referred to as "RICO/CRRA") because it

authorizes the use of draconian weapons against publishers and distributors of expression—including forfeiture of the entirety of the inventory, assets, and income of the speech enterprise—based only on a finding that the publisher or distributor violated state obscenity laws on two occasions.

Indiana's RICO statute makes a criminal and civil offense of "corrupt business influence," which is committed when a person receives proceeds from, maintains an interest in an enterprise through, or is associated with an enterprise engaged in, a "pattern of racketeering activity." Ind. Code § 35-45-6-2. The statute enumerates various predicate offenses, including obscenity violations, which constitute "racketeering activity," and defines a "pattern" as two or more acts of racketeering activity. The companion CRRA statute authorizes a panoply of "remedies" against violators of the "corrupt business influence" provision, including injunctions against continuing to engage in the illegal enterprise or any similar business, orders dissolving the enterprise, license, charter, or permit revocation, and forfeiture. The forfeiture provision authorizes the State to seize for forfeiture "any property used in the course of, intended for use in the course of, derived from, or realized through" a pattern of racketeering activity. *Id.* § 34-4-30.5-3. To obtain a seizure order and to justify a forfeiture, the State need show by only *a preponderance of the evidence* that the property sought to be forfeited was used or intended for use in racketeering activity. *Id.*

The Supreme Court of Indiana acknowledged that "the Indiana RICO statute . . . is essentially patterned after the federal anti-racketeering laws." *4447 Corp. v. Goldsmith*, 504 N.E.2d 559, 560 (Ind. 1987).[1] In *Russello v.*

[1] There are differences between the two schemes, including, for example, that the forfeiture provisions of federal RICO are labeled "criminal penalties" while Indiana labels them "civil remedies," and that forfeiture under federal RICO requires the government to carry a burden of persuasion more stringent than the mere preponderance standard applicable under Indiana's RICO/CRRA.



*United States*, 464 U.S. 16 (1983), and *United States v. Turkette*, 452 U.S. 576 (1981), this Court surveyed the legislative history of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, and observed that it creates "unprecedented . . . '[d]rastic' . . . 'extraordinary'" remedies, 464 U.S. at 26-27 (quoting Senators McClellan and Hruska), including forfeiture and broad-ranging injunctions, thought necessary "for an assault upon organized crime and its economic roots." *Id.* at 26. Congress declared, as this Court observed, that "[i]t is the purpose of this Act to seek the *eradication* of organized crime." *Id.* at 27 (emphasis added). The forfeiture provision, in particular, was intended to "'*incapacitate*, and . . . *directly to remove* the corrupting influence from the channels of commerce.'" *Id.* at 28 (emphasis added) (quoting Senator McClellan). As Senator McClellan—sponsor of the federal RICO legislation—made plain, RICO forfeiture was specifically intended to "provide a means of wholesale removal" of offending enterprises and "prevention of their return." 116 Cong. Rec. 18939 (1970).

When the federal RICO statute was originally enacted, obscenity was not included as a predicate offense. Congress believed traditional criminal penalties and procedures had been insufficient to suppress the types of offenses traditionally committed by organized crime. The new "drastic" remedies were designed to succeed where traditional means had failed. *United States v. Turkette*, 452 U.S. at 589. The predicate offenses Congress initially included in the federal RICO legislation were not speech offenses, and their regulation, even with unusually severe sanctions, did not pose any First Amendment problems. Several years later, however, apparently, without any consideration of the First Amendment implications, Congress amended RICO to include obscenity as a predicate offense.

The recent efforts of the federal government and the State of Indiana to redirect RICO away from the regulation of organized crime and non-speech offenses, and toward the regulation of expression by persons who have no connection with organized crime,[2] has created a grave threat to fundamental First Amendment values. When used as a means to regulate obscenity, both Indiana's RICO/CRRA and the federal RICO statute authorize the forfeiture of an entire bookstore and all of its presumptively lawful speech materials based only on a showing that the bookstore sold two books or magazines later determined by a court to be obscene.

The facts of the present case illustrate the threat to First Amendment values posed by the use of RICO sanctions and remedies to regulate expression. In the consolidated cases below, Indiana sought the sealing, seizure, and forfeiture of six bookstores and their contents based solely on allegations that some of the materials that had been sold there, were presently for sale there, and, in the case of a store that had not yet been opened, would one day be offered for sale there, were obscene. 504 N.E.2d at 561-63. In the Indianapolis case, the Supreme Court of Indiana held that RICO/CRRA authorizes the forfeiture of two operating bookstores and a new bookstore that has yet to open on the basis of only four obscene tapes offered for sale at the operating stores. *Id.* at 562.

Seizure and threatened forfeiture on this massive scale raise a host of substantive and procedural issues. There is little question, for example, that these seizures and the *ex parte* orders authorizing them violate well-established

[2] The Attorney General's Commission on Pornography recently concluded that there is little evidence of involvement by "La Cosa Nostra" in the "pornography industry." "Organized crime" may be said to play a role only if it is defined to include "any large and organized enterprise" engaged in violating the obscenity laws. *See* Attorney General's Commission on Pornography, 1 Final Report 291-97 (1986).



First Amendment limitations on pretrial seizures of expressive materials. *E.g., Marcus v. Search Warrant of Property*, 367 U.S. 717 (1961). *Amicus* will not address these procedural questions, but instead urges this Court to focus on the underlying substantive issue this case presents: whether the First Amendment permits massive forfeiture of constitutionally protected expressive materials based only upon past or present violation of obscenity laws. This substantive issue is at the core of the present case because the pretrial seizures were made pursuant to the authority of the RICO/CRRA forfeiture provision, and were undertaken only for the purpose of preserving the seized materials and assets for eventual forfeiture.

Applying the First Amendment standard of review applicable to direct governmental efforts to regulate expression based on the content of the expression, (Point I), *amicus* will demonstrate that use of the forfeiture provisions of RICO/CRRA to regulate obscenity violates the First Amendment. This use of forfeiture constitutes a prior restraint of constitutionally protected expression, (Point II), and, because it is not narrowly tailored to prevent self-censorship, exerts an unconstitutional chilling effect on protected expression, (Point III).

## ARGUMENT

### I. IMPOSITION OF RICO/CRRA REMEDIES FOR PREDICATE OFFENSES OF OBSCENE SPEECH MUST BE EVALUATED UNDER THE EXACTING FIRST AMENDMENT STANDARD OF REVIEW APPLICABLE TO GOVERNMENT EFFORTS TO REGULATE EXPRESSION BASED ON THE CONTENT OF THAT EXPRESSION.

Indiana's decision to include the crime of obscenity within RICO/CRRA's definition of "racketeering activity" constitutes a direct, affirmative governmental regulation of expression based on the content of that expres-

sion. This use of RICO sanctions and remedies must meet the exacting First Amendment tests applicable when government regulates expression "because the communication . . . is itself thought to be harmful." *United States v. O'Brien*, 391 U.S. 367, 382 (1968). *Accord Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976); *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974). *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1496-1502 (1975). As this Court made clear in *Arcara v. Cloud Books, Inc.*, "least restrictive means" scrutiny applies when "a significant expressive element drew the legal remedy in the first place." 478 U.S. 697, ——, 92 L. Ed. 2d 568, 578 (1986). *See also Speiser v. Randall*, 357 U.S. 513, 520 (1958). Regulation of obscenity through RICO must thus be subject to at least the same scrutiny as is applied to other government efforts to regulate obscenity. Like all other "statutes designed to regulate obscene materials," RICO "must be carefully limited" to minimize the "inherent dangers" of censoring, or causing self-censorship of, constitutionally protected, nonobscene expression. *Miller v. California*, 413 U.S. 15, 23-24 (1973). *Accord Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) (obscenity regulation must "conform to procedures that will ensure against the curtailment of constitutionally protected expression").

The Supreme Court of Indiana made no effort to ascertain whether Indiana's use of RICO/CRRA remedies to "eradicate" and "incapacitate" speech enterprises was "carefully limited" to protect against the censorship and self-censorship of protected expression. This failure alone warrants reversal. Instead, believing that RICO/CRRA was not designed to regulate expression at all, the court applied the deferential standard of review applicable to regulations that serve governmental interests unrelated to the suppression of expression and impose at most in-



cidental burdens on expression. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (deferential review of application of nuisance abatement law to bookstore when abatement was based on non-speech ground that prostitution occurred on premises); *see also United States v. Albertini*, 472 U.S. 675, 687-688 (1985); *United States v. O'Brien*, 391 U.S. at 377. RICO/CRRA, as the Indiana court would have it, is not a government effort to "restrain the sale or distribution of expressive materials" because the statute aims to regulate "racketeering," not obscenity *per se*. 504 N.E.2d at 564.

The state court's analysis, however, obscures RICO/CRRA's true nature. In *Near v. Minnesota*, this Court rejected an indistinguishable semantic maneuver intended to avoid First Amendment constraints. Attempting to justify the application of a nuisance abatement law to enjoin a newspaper from future libelous publication on the basis of a finding of past libel, the State in *Near* had argued that it was merely regulating a business causing a public nuisance. "Characterizing the publication as a business and the business as a nuisance," the Court held, "does not permit an invasion of the constitutional immunity against restraint." 283 U.S. 697, 720 (1931). Similarly, the Supreme Court of Indiana's efforts to characterize expression as "racketeering activity" and racketeering activity as a felony cannot suffice to exempt Indiana's RICO statute from strict First Amendment scrutiny. When the State uses RICO/CRRA to regulate expression, the statute must pass muster under First Amendment standards applicable to all direct government efforts to regulate expression.[3]

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[3] As explained in *Schad v. Borough of Mt. Ephraim*, "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." 452 U.S. 61, 68 (1981) (zoning law prohibiting "live entertainment," including nude dancing, subject to strict scrutiny). *Accord Vance v. Universal Amusement Co.*, 445

Applying the proper First Amendment standard of review, *amicus* will demonstrate that when based on the predicate offense of obscenity, the forfeiture provisions of RICO/CRRA violate the First Amendment for two reasons. *First*, in such cases, the forfeiture and accompanying injunctive provisions constitute an unconstitutional prior restraint on expression. *Second*, these provisions are not narrowly tailored to prevent self-censorship, and thus exert an unconstitutional chilling effect on protected expression.

## II. WHEN APPLIED IN CASES INVOLVING PREDICATE ACTS OF OBSCENE SPEECH, THE FORFEITURE AND INJUNCTIVE PROVISIONS OF RICO/CRRA AUTHORIZE UNCONSTITUTIONAL PRIOR RESTRAINTS ON EXPRESSION.

The Supreme Court of Indiana avoided the conclusion that RICO/CRRA authorizes an unlawful prior restraint, but only by positing a justification inconsistent with the statute's terms and its acknowledged effect. The face of the statute and the State's actions taken pursuant to it plainly demonstrate that the court below was wrong in asserting that forfeiture under RICO/CRRA "is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *4447 Corp. v. Goldsmith*, 504 N.E. 2d at 565. In the cases below, the State sought the sealing, seizure, and forfeiture of six bookstores and their contents based solely upon allegations that some of

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U.S. 308 (1980) (per curiam) (nuisance abatement law subject to strict scrutiny when applied to regulate expression); *Near v. Minnesota*, 283 U.S. 697 (1931) (same); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 730 (1961) ("The Missouri Supreme Court's assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure does not . . . answer the appellant's constitutional claim, but merely restates the issue whether obscenity may be treated in the same way"). *See also Arcara v. Cloud Books, Inc.*, 478 U.S. at ——, 92 L.Ed.2d at 569 (O.Connor, J., concurring).



the materials that had been sold there, were presently for sale there, and, in the case of the store that had not yet been opened, would one day be offered for sale there, were obscene. *Id.* at 561-63.[4] No proof was offered (or required by the statute) that the stores and their entire contents constituted the "ill-gotten gains" of obscenity violations or any other "racketeering" activity.[5] To the contrary, as the Indiana court recognized, to obtain forfeiture of a bookstore under RICO/CRRA, the State must prove only that the store was used or intended for use in committing the crime of obscenity. *Id.* at 561 ("Upon a showing by a preponderance of the evidence that the property in question was so used, the court shall order the property forfeited to the state"). *See* Ind. Code § 34-4-30.5-3(a). In fact, in the Indianapolis case, the Indiana court indicated RICO/CRRA would authorize the forfeiture of two operating bookstores and a new bookstore that had yet to open on the basis of only four obscene tapes offered for sale at the operating stores. *Id.* at 562. Such a massive forfeiture could not be justified on the ground that all of the inventory of those bookstores had been acquired with the "ill-gotten gains" from the sales of four obscene tapes. On the facts of this case, forfeiture under RICO/CRRA could be based only on the theory—recognized by the Indiana court—that the stores and inventory were "used in the course of," or "intended for the use in the course of," obscenity violations.

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[4] There is no allegation in this case that all or most of the materials for sale in these stores was obscene. To the contrary, in the Indianapolis case the State alleged only four videotapes to be obscene, and in the Fort Wayne case, none of the current inventory was alleged to be obscene; the State relied exclusively on the fact of prior obscenity convictions. Until proved by the State to be obscene, of course, speech is presumptively constitutionally protected. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975).

[5] No "racketeering" activity other than obscenity violations was ever alleged.

Nor can the rationale of disgorgement of ill-gotten gains explain or justify the other remedies authorized by CRRA, such as, for example, license revocation, corporate charter revocation, *see 4447 Corp. v. Goldsmith*, 479 N.E. 2d 578, 582 (Ct. App. Ind. 1985) (State sought these remedies in the instant case), or an injunction "prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged" in violation of RICO. Ind. Code § 34-4-30.5-2(2).[6] Such remedies, like "use" or "intended use" based forfeiture, are obviously forward-looking, and have nothing to do with disgorgement.

The Indiana RICO/CRRA, like the federal RICO statute, thus has far more ambitious and "far-reaching" objectives than disgorgement of illegal profits.[7] *Russello v. United States*, 464 U.S. at 27. Indiana's RICO remedies are sweeping—authorizing the seizure and forfeiture of anything used or *intended* for use in a violation, and authorizing license and charter revocation and broad injunctions against similar conduct in the future—because, like the federal RICO statute, RICO/CRRA is designed in substantial part to prevent enterprises that have violated "racketeering" laws from doing so ever again—to *incapacitate* them. As the statutory text and legislative history make clear, the federal RICO statute is meant to put the enterprise out of business once and for all, and to prevent its reappearance in another form, by forfeiting not only the proceeds of illegal activity, but also any

[6] The federal RICO statute authorizes a similar injunctive remedy. 18 U.S.C. § 1964(a).

[7] If, however, the statute's intent *were* limited to disgorgement of assets acquired unlawfully, the statute would be grossly overbroad, because neither by its terms nor by its effect is it limited to disgorgement of such assets. Instead, the statute applies, as here, to a substantial amount of presumptively protected speech material —and the proceeds of the sale of such material—that have not in any sense been shown to have been acquired through racketeering activity.



property affording a "source of influence" over the "racketeering" activity, 18 U.S.C. § 1963(a)(2), and any interest the defendant has in the "enterprise" that violated the law, 18 U.S.C. § 1963(a)(1); and by authorizing injunctions against the defendant's "engaging in the same type of endeavor as the enterprise engaged in," 18 U.S.C. § 1964(a). The Indiana law has the same effect, authorizes the same drastic remedies, and has the same "far-reaching" objective. Applied wholesale in the obscenity context, RICO/CRRA prevents a speech enterprise—a bookstore, theater, etc.—from committing further obscenity violations by preventing it from speaking at all.

This purpose and effect of federal RICO was expressly recognized in the Meese Commission's Report on Pornography, which urged prosecutors to use forfeiture to "literally put many pornographers out of business." Attorney General's Commission on Pornography, 1 Final Report 464 (1986). The Commission observed that "RICO provides an effective means to substantially eliminate obscenity businesses." *Id.* at 498.[8]

Such incapacitation of a speech enterprise based upon past obscenity violations is a classic prior restraint prohibited by the First Amendment. Although for non-speech offenses incapacitation of an offending business poses few constitutional difficulties, incapacitation because of speech offenses is fundamentally different. Unlike laws dealing with non-speech crimes such as gambling or extortion, statutes regulating obscenity must be carefully drawn "to avoid suppression of constitutionally protected publications." *Marcus v. Search Warrant of Property*, 367 U.S. at 730-731. In *Near v. Minnesota*, 283 U.S. 697, this Court condemned a scheme under which Min-

[8] Press reports indicate that law enforcement officials in Florida have already successfully used that State's RICO statute to close down bookstores because of their expressive activity. Wall St. J., Aug. 25, 1987, at 25.

nesota "empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive." *Kingsley Books, Inc v. Brown*, 354 U.S. 436, 445 (1957). As the Eleventh Circuit has observed, "[i]n *Near* the Supreme Court condemned prior restraints prohibiting future expression that may fall within the purview of the First Amendment where such restraint is based only on a finding of unprotected present conduct." *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1551 (1983) (mem.) (affirming on the basis of district court's opinion). Such a restraint on future speech based upon a finding that past speech was unprotected is " 'the essence of censorship.' " *Kingsley Books*, 354 U.S. at 445 (quoting *Near*, 283 U.S. at 713).

*Near* presented a statutory scheme strikingly similar to that at issue here. The "reason for the enactment" struck down in *Near* was Minnesota's determination that traditional "prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression' " of libelous speech. 283 U.S. at 711. Similarly, as noted, the reason for the enactment of RICO statutes was Congress' determination, adopted by the State of Indiana, that activities denominated "racketeering," later defined as including obscenity, could not be sufficiently repressed or suppressed by traditional prosecutions and other "remedies available to the government." *Turkette*, 452 U.S. at 589. In *Near*, Minnesota had decided that instead of prosecuting individual criminal libels as they occurred, it would authorize abatement of the "business" or economic base from which those libels had emanated. 283 U.S. at 717.[9] This, of course, is precisely the operation and effect of the RICO/CRRA remedies of forfeiture, revocation, and injunction in the obscenity context: eradicating the

[9] Minnesota's nuisance abatement statute applied to obscenity as well as to "malicious, scandalous and defamatory" publications. 283 U.S. at 702.



enterprise from which the obscenity violations emanated. Because, as in *Near*, RICO statutes as applied to speech shut down speech enterprises solely because they engaged in unlawful speech in the past, they are plainly unconstitutional.

Although the predicate for imposing the restraint is the same under RICO/CRRA as it was in *Near*—commission by the defendant business of prior speech offenses—the restraint authorized is even more inimical to First Amendment values than was the restraint in *Near*. At issue in *Near* was an injunction that restrained defendants only from publishing "a malicious, scandalous or defamatory newspaper, as defined by law." 283 U.S. at 706. The *Near* Court struck down this injunction even though it permitted the publisher to publish a newspaper that did not contain libelous material. *Id.* at 712-13. RICO/CRRA, however, authorizes seizure and forfeiture of all the expressive materials owned by the enterprise, as well as all other property and assets of the business. Such physical seizure of expressive materials is "more repressive than an injunction preventing further sale." *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964) (plurality opinion). As this Court has ruled, seizure is "an effective restraint—indeed the *most* effective restraint possible— . . . because all copies on which the police could lay their hands were physically removed from the newsstands and from the wholesale distributor." *Marcus v. Search Warrant of Property*, 367 U.S. at 736 (emphasis added). RICO/CRRA, of course, goes still further: it authorizes the seizure and forfeiture of the means of obtaining or selling any *other* expressive materials. Furthermore, RICO/CRRA authorizes the court to enter an injunction broader by far than that struck down in *Near*, prohibiting the defendant from ever again operating an adult bookstore.[10]

[10] The remedies authorized by RICO/CRRA clearly pose the dangers of prior restraints identified by Justice White in his dissent in

Forfeiture and the other remedies authorized by RICO/CRRA are merely more repressive versions of numerous other forms of prior restraint attempted against adult bookstores over the years. States and municipalities have attempted to impose prior restraints by authorizing the padlocking of adult bookstores shown to have violated the obscenity laws;[11] by authorizing revocation of the business licenses of adult bookstores on the basis of obscenity violations;[12] and by authorizing nuisance abatement through injunctive remedies.[13] These remedies, each authorized by RICO/CRRA and each less oppressive than the combined remedies here at issue, have been struck down in virtually every case in which they were predicated on past obscenity violations.

The nuisance abatement remedy upheld in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, was fundamentally different from that at issue here both in its impact on constitutionally protected speech and in the predicate for imposing the remedy. Distinguishing *Near*, the *Arcara* Court observed that the forfeiture order there merely

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*Vance v. Universal Amusement Co.*, 445 U.S. at 324: "through caprice, mistake, or purpose, the censor may forbid speech which is constitutionally protected." RICO/CRRA restrains *all* speech by the defendant, whether constitutionally protected or not.

[11] *E.g., Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 1022 (1981); *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978), *aff'd on other grounds*, 445 U.S. 308 (1980) (per curiam); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *General Corp. v. State*, 294 Ala. 657, 320 So.2d 668 (1975), *cert. denied*, 425 U.S. 904 (1976); *People v. Projection Room Theater*, 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P.2d 600, *cert. denied*, 429 U.S. 922 (1976).

[12] *E[illegible] Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980).

[13] *E.g., Vance v. Universal Amusement Co.*, 445 U.S. 308; *Near v. Minnesota*, 283 U.S. 697.



closed the premises where unlawful sexual *conduct* was taking place; it imposed "no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location." 92 L. Ed. at 577, n.2. RICO/CRRA, in contrast, like the unconstitutional schemes in *Marcus*, 367 U.S. 717, and *A Quantity of Copies of Books*, 378 U.S. 205, imposes the "most effective restraint possible" on the dissemination of particular materials—all expressive materials on the premises are seized. Moreover, RICO/CRRA is designed to deprive the defendant of the economic capacity to continue his business or open a new one, and even authorizes an injunction against the defendant's opening a new adult bookstore.

Even more important, the *Arcara* Court emphasized that "the imposition of the closure order" in that case had "nothing to do with any expressive conduct at all." 92 L. Ed. 2d at 577, n.2. The bookstore was closed as a public health measure to prevent continued prostitution and other *non-speech* activity on the premises. In the Court's view, the fact that expressive materials were involved was a coincidence, and the impact on speech activities was only incidental. It was implicit in the Court's analysis, as Justice O'Connor observed, that use of a nuisance statute to "clos[e] down a book store because it sold indecent books . . . would clearly implicate First Amendment concerns." *Id.* at 579. Unlike the closure at issue in *Arcara*, RICO/CRRA is unconstitutional as applied to expressive activity because it authorizes complete eradication of a speech enterprise based solely upon a finding that the enterprise has engaged in instances of obscene speech in the past. While the application of this ordinance in *Arcara* "differ[ed] from a prior restraint," *id.* at 577, n.2, this case presents a prior restraint in its most virulent form.

None of the rationales offered on behalf of RICO forfeiture and CRRA's accompanying remedies in the ob-

scenity context can justify the prior restraint they impose. It is a further constitutional shortcoming of RICO/CRRA forfeiture, not a saving feature, for example, that it restrains *all* future speech by the defendant enterprise, not only that speech which the State believes will be obscene. A broad, so-called "content neutral" restraint on speech, triggered by some past unprotected speech offense, is just as unlawful as a content-based restraint aimed only at future unlawful speech. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). The reason a narrow, content-based ban such as that condemned in *Near* is not permitted is that the State cannot presume in advance that future speech will be unprotected. Where the State knows in advance that much of the speech restrained will be lawful, its sweeping ban is doubly unconstitutional, and many times more dangerous.[14]

Nor can the RICO/CRRA remedies of forfeiture and injunction be upheld as "criminal penalties," rather than prior restraints. *See, e.g., Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980). First, the remedies of forfeiture, revocation, and injunction, like nuisance abatement in *Near*, are expressly "civil remedies" under Indiana law, and are authorized by the Civil Remedies for Racketeering Activity Act. *See* 4477

[14] Similarly, RICO/CRRA forfeiture cannot be justified as authorizing only the seizure and destruction of publications found after a trial to have been obscene, *Kingsley Books, Inc.*, 354 U.S. 436, because it authorizes forfeiture of materials that have not been found obscene. Nor, as noted, can it be argued that forfeiture is justified as requiring only the disgorgement of the fruits of illegal activity. See, in addition to the Supreme Court of Indiana's opinion in the present cases, *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987) (purporting to limit federal RICO forfeiture to disgorgement of ill-gotten gains). Materials proved to be obscene and the profits therefrom almost invariably constitute a minute percentage of the materials and assets forfeited under RICO, as in the cases before the Court.



*Corp. v. Goldsmith*, 504 N.E.2d at 561. In addition, those remedies can be invoked if a "violation" of the obscenity laws is found by a *preponderance of the evidence*, and if it is shown by a preponderance of the evidence that the property in question was "used" or "intended for use in the course of" an obscenity violation. *Id.*

Furthermore, even a prior restraint imposed as a *criminal* penalty, as in the federal RICO statute, would remain a prior restraint. "[T]he standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed. *Schad v. Borough of Mt. Ephraim*, 452 U.S. at 68. The relevant fact is that future speech would be restrained based on a finding of past unprotected speech, not that criminal rather than civil power is invoked to accomplish the restraint. In the prior restraint context, in particular, "the court has regard to substance and not to mere matters of form, and . . . [a] statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. at 708. *Accord Speiser v. Randall*, 357 U.S. at 520. Because the effect —and manifest purpose—of federal RICO, when based on predicate obscenity offenses, is to impose a prior restraint, it, too, is unconstitutional, despite the "criminal penalty" label attached by Congress.

A similar "criminal penalty" argument was raised and rejected in *Near*. The *Near* Court, looking to the substance of the statute, recognized that its object was "not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical." 283 U.S. at 710. To hold, in effect, that Indiana could constitutionally eradicate speech enterprises simply by adopting a new statute characterizing the RICO/CRRA forfeiture, revocation, and injunction provisions as "criminal penalties," would destroy prior restraint doctrine, the centerpiece of First Amendment jurisprudence. Such a ruling would validate *any* prior restraint if it were accomplished as "punish-

ment" imposed after a criminal trial: this Court's rulings in *Near* and *Vance*, for example, could be evaded by the expedient of changing the label under which the injunctions in those cases were imposed. Moreover, legislatures and municipal governments would be free to enact "banning orders" as punishment for speech-related crimes. An individual convicted of burning his draft card, as in *United States v. O'Brien*, 391 U.S. 367 (1968), or an individual convicted of violating an injunction against street demonstrations, as in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), could be banned from participating in *any* future political demonstration as "criminal punishment."

Such results are inconceivable, and the prior restraints at issue in this case are similarly unconstitutional regardless of the labels used to impose them or their purported rationale. However denominated, the State may not constitutionally impose a far-reaching ban on future speech predicated on past objectionable speech activity.[15]

Finally, it is immaterial to the present case that incarceration, which can undoubtedly be imposed as a punishment for violation of obscenity laws, has an incidental impact on speech rights. *See Arcara v. Cloud Books, Inc.*, 92 L. Ed. 2d at 577. Imprisonment is a traditional punishment, *see Kingsley Books, Inc.*, 354 U.S. at 444, imposed for violation of numerous criminal laws to accomplish several well-recognized purposes, such as deter-

[15] In many cases, courts have rejected the contention that prior conviction justifies the deprivation by the State of any First Amendment liberty (other than the right to vote, the deprivation of which is expressly authorized in the Fourteenth Amendment). *See, e.g., Genusa v. City of Peoria*, 619 F.2d 1203, 1219 (7th Cir. 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F. Supp. 994 (S.D.N.Y. 1972); *Perrine v. Municipal Court*, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P.2d 648 (1971), *cert. denied*, 404 U.S. 1038 (1972); *City of Delavan v. Thomas*, 31 Ill. App. 3d 630, 334 N.E.2d 190 (1975); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (1975); *Seattle v. Bittner*, 81 Wash. 2d 747, 505 P.2d 126 (1973).



rence and rehabilitation, that are wholly unrelated to imposing a prior restraint on or otherwise suppressing speech. Any hypothetical restraint incarceration might impose on expression is therefore incidental to its primary functions. Moreover, the incidental restraint on speech imposed by imprisonment is limited; the First Amendment ensures that consistent with the penological institution's legitimate non-speech objectives "reasonable and effective means of communication remain open" to prisoners. *Pell v. Procunier*, 417 U.S. 817, 826 (1974); *see also Jones v. North Carolina Prisoners' Union*, 443 U.S. 119 (1977). In contrast, the restraints imposed by RICO/CRRA are neither incidental nor limited. They are "weapons of unprecedented scope," "drastic methods," *Russello v. United States*, 464 U.S. at 26, that are specifically intended in the obscenity context to eradicate the speech enterprise and prevent future speech activities. Accordingly, they are plainly unconstitutional when predicated on speech crimes.

## III. AS APPLIED TO PREDICATE ACTS OF OBSCENE SPEECH, RICO/CRRA'S FORFEITURE PROVISIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY ARE NOT NARROWLY TAILORED TO PREVENT THE SELF-CENSORSHIP OF CONSTITUTIONALLY PROTECTED EXPRESSION.

Although the First Amendment does not protect obscene expression, *Roth v. United States*, 354 U.S. 476 (1957), only a small portion of sexually oriented expression falls within the narrow category of unprotected obscenity set forth in *Miller v. California*, 413 U.S. 15 (1973). *Miller* defined obscenity as expression that: (1) taken as a whole, appeals to the prurient or "morbid" interest in sex, *id.* at 24; *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985); (2) describes specific hard-core sexual conduct in a patently offensive way, *Miller*, 413 U.S. at 24; and (3) taken as a whole, lacks "serious literary, artistic, political, or scientific

value." *Id.* As this Court's careful delimitation of unprotected obscenity makes clear, "[s]ex and obscenity are not synonymous." *Roth*, 354 U.S. at 487. Rather,

> "[s]ex, a great and mysterious motive in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

*Id.* All sexually oriented expression that is not obscene receives full constitutional protection, *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 208-211 (1975); *Jenkins v. Georgia*, 418 U.S. 153 (1974), whether presented as science, art, or entertainment. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). This protection extends to the distribution as well as the publication of such expression. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58.

This Court has repeatedly stressed that because "the line between speech unconditionally guaranteed and speech which legitimately may be regulated, suppressed or punished, is finely drawn[,] . . . [t]he separation of legitimate from illegimate calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. at 525. Thus, as with all government efforts to prohibit unprotected expression, "statutes designed to regulate obscene material must be carefully limited." *Miller*, 413 U.S. at 24. When seeking to restrict the dissemination of unprotected obscenity, government "is not free to adopt whatever procedures it pleases . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant of Property*, 367 U.S. at 731; *Smith v. California*, 361 U.S. 147, 152 (1959). The RICO statute at issue here—like all government regulation of obscenity—must be drawn to ensure that the regulation neither directly prohibits nor indirectly deters protected expression. Because First Amendment freedoms are "delicate and vulnerable," a "threat of sanctions may deter their exercise almost as potently as the actual application of



sanctions." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

Whether a particular regulation will cause an unconsitutional "chill" or self-censorship of protected expression depends upon several considerations, including:

> (i) the precision and scope of the proscription of expression, *e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (regulation "must aim specifically at evils within the allowable area of state control");
>
> (ii) the burdens the regulation imposes on those seeking to disseminate expression, *e.g.*, *Smith v. California*, 361 U.S. at 151-155 (discussing need for scienter requirement in obscenity cases to prevent self-censorship by booksellers);
>
> (iii) the nature of the procedures used to determine whether the regulation has been transgressed, *e.g.*, *Speiser v. Randall*, 357 U.S. at 526 (forbidding allocation to speaker of burden of proof that allegedly unlawful expression was constitutionally protected); and
>
> (iv) the severity of the consequences imposed on the transgressor, *e.g.*, *New York v. Ferber*, 458 U.S. 747, 774 (1982) (recognizing "that the penalty to be imposed is relevant" to chilling effect analysis).

*See generally*, Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 24-27 (1981); Schauer, *Fear, Risk And The First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. Rev. 685 (1978).

The principles developed in these cases require facial invalidation of Indiana's use of RICO remedies to regulate obscenity. Indiana's RICO/CRRA statute is certain to chill a vast amount of constitutionally protected expression because the statute incorporates a vague and uncertain substantive standard, employs plainly inadequate procedures, and threatens devastating consequences.

This Court has long acknowledged the intractable difficulty of establishing a workable definition of unprotected "obscenity." *See, e.g., Miller*, 413 U.S. at 27-28. At best, "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 66. Members of the Court have even expressed some dissatisfaction within the "line" drawn in *Miller*. *See, e.g., Pope v. Illinois*, —— U.S. ——, 107 S.Ct. 1918, 1923, 95 L. Ed. 2d 439 (1987) (Scalia, J., concurring) (suggesting "reexamination of *Miller*"); *Smith v. United States*, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting).[16] One commentator has observed:

> "The 'inevitably obscure' standards which define obscenity do more than simply raise the level of uncertainty in an individual's own mind as to the lawfulness of the contemplated conduct. In addition, these standards, and the difficulty of their application by judge or juror, increase the likelihood of error in the litigation process itself."

*Schauer*, 58 B.U.L. Rev. at 717. This uncertainty and risk of error necessarily engender self-censorship of constitutionally protected speech, although to a degree thought tolerable when sanctions are limited and may be imposed only upon criminal conviction.

Indiana's use of RICO/CRRA to regulate obscenity intolerably exacerbates the risks to freedom of expression that inhere in the intractably vague substantive definition of obscenity. *First*, the RICO statute imposes consequences so devastating that they are certain to cause would-be speakers "to steer far wider of the [uncertain

[16] At least one state supreme court has invoked state constitutional grounds to invalidate a statute embodying the *Miller* test because "such an indeterminate test is intolerable." *State v. Henry*, 302 Or. 510, 732 P.2d 9, 10 (1987).



but] unlawful zone." *Speiser v. Randall*, 357 U.S. at 526. *Second*, RICO/CRRA authorizes these devastating sanctions upon a mere showing by "a preponderance of the evidence" that a defendant transgressed this "dim and uncertain line." The chilling effect of the unprecedented severity of the forfeiture sanctions and this minimal burden of proof, when coupled with the inherently vague substantive definition of obscenity, violates the First Amendment.

1. *Severity of Sanction.* It is axiomatic that the deterrent effect of a government sanction will increase as the sanction becomes more severe. Erlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. Legal Stud. 259 (1972): R. Posner, *Economic Analysis of Law* 165 (1977). This is equally true when the sanction is imposed for violation of a law regulating expression. Commentators have recognized that "the risk of self-censorship is likely to be compounded by the potential severity of the sanctions that can be imposed against speakers." Blasi, *supra*, 66 Minn. L. Rev. at 26. *Accord* Schauer, *supra*. In *New York v. Ferber*, this Court acknowledged this reality when it specifically directed that the severity of the consequences for violating a regulation of sexual expression be considered in evaluating the chilling effect of that regulation. 458 U.S. at 774. This Court has also taken account of the chilling effect of draconian sanctions for unprotected expression in analogous contexts. In *Gertz v. Robert Welch, Inc.*, for example, the Court held that because the threat of huge punitive damage awards in defamation cases chills protected expression, the availability of punitive damages must be limited to cases (other than those of purely private concern) in which a plaintiff can prove with convincing clarity that a defendant acted with "actual malice." 418 U.S. 323 (1974). *Cf. Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (arguing that only "the most nominal punishment"

could constitutionally be inflicted for the alleged speech crime at issue).

Lower courts have also recognized the importance of severity of punishment in gauging the chilling effect of laws regulating expression. In *State of CMH Enterprises*, No. CM87-1781A7 (10th Judicial Cir., Fla., Jan. 8, 1988) (copies lodged with the clerk), for example, a state circuit court invalidated that State's RICO statute as applied to the predicate offense of obscenity because the statute authorized a thirty-year jail term. Given the unprecedented severity of the sentence, the court found, "few individuals will be willing to accept the extreme penalty for a wrong guess." Op. at 13. *See also Polykoff v. Collins*, 816 F.2d 1326, 1340 (9th Cir. 1987) (recognizing that excessive penalties will chill exercise of First Amendment rights).

RICO statutes exert a chilling effect that truly overwhelms any chill ever before considered in the First Amendment context. Indiana's statute specifically authorizes the forfeiture of "any property used in the course of, intended for use in the course of, derived from, or realized through" obscene speech. Ind. Code § 34-4-30.5-3. Forfeiture on this scale is, as the Supreme Court of Indiana acknowledged, a government "weapon[] of unprecedented scope." 504 N.E.2d at 564 (quotation omitted). As the facts of this case demonstrate, this statute authorizes the seizure and forfeiture of the entire contents of a bookstore—including both expressive materials and essentials such as shelving—and all assets owned or controlled by the bookstore or its owner. Under RICO/CRRA two isolated examples of expression found to be obscene in any community in Indiana poison all proceeds derived from the sale not only of *those* unlawful materials, but also of all constitutionally protected materials, and all assets of a corporation that publishes or distributes such materials. As was plainly intended by the architects of RICO/CRRA, any business that risks



two obscenity convictions is risking a corporate death penalty.

Thus, if a nationwide film distributor such as Loews Incorporated exhibited the critically acclaimed but "X" rated motion picture "Last Tango in Paris" in theaters in Indiana and received revenues therefrom, and if two exhibitions of the film were held to violate Indiana's obscenity laws, then RICO/CRRA's forfeiture provision would authorize the State to seize all assets of the distributor within the State's jurisdictional reach. Similarly, if a magazine distributor distributed *Penthouse* magazine in Indiana, and were prosecuted for two issues (or even two copies of a single issue) found to be obscene anywhere in Indiana, the entire stock and assets of the distributor—including not only *Time*, *Newsweek*, and its other magazine inventory, but also its vehicles and storage areas—would be forfeited to the State. Or if a college bookstore were prosecuted for sale of two copies of Henry Miller's *Tropic of Capricorn* in a community in which that book was found to be obscene, the bookstore's assets (and perhaps the college's assets) would be forfeited in their entirety.

Confronted with a threat of this magnitude, any rational film exhibitor, magazine distributor, or bookstore owner will be forced to avoid the "dim and uncertain" line marking the danger zone by self-censoring virtually all sexually explicit expression. To do less would be to risk the entirety of one's business. Because the expression thus self-censored is presumptively protected under the First Amendment, and the vast majority of such expression would doubtless not be found obscene, the severity of RICO/CRRA's forfeiture provision exerts an unconstitutional chilling effect.

2. *Inadequacy of Procedures.* Indiana's RICO forfeiture provision is constitutionally deficient in a second crucial way. It authorizes forfeiture of the magnitude just described based on a showing by a mere preponder-

ance of the evidence that a defendant "violated" Indiana's obscenity law. Ind. Code § 34-4-30.5-3. Especially in light of the inherent ambiguity of the underlying definition of obscenity and the extraordinarily severe consequences attending violation of RICO/CRRA, the "preponderance of the evidence" standard is plainly inadequate to protect the First Amendment interests at stake. *Smith v. California*, 361 U.S. 147; *Speiser v. Randall*, 357 U.S. 513.[17]

In *Speiser*, this Court explained that when a State seeks to demonstrate the unlawfulness of expression "the procedures by which the facts of the case was adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford." 357 U.S. at 521. The burden of proof, the Court went on to note, "may be decisive of the outcome," *id.* at 525, because it allocates the risk of error between the parties:

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcendent value . . . this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.
>
> "[W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that legitimate utterance will be penalized. . . . This is especially to be feared when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position."

*Id.* at 525-526. If allocation of the burden of proof creates a significant risk that a defendant will erroneously be found to have engaged in unprotected expression, *Speiser* concluded, then this risk will chill protected expression. *See generally*, Schauer, *supra*, 58 B.U.L. Rev. at 704 ("By choosing rules that minimize the risk of an erroneous judgment, we lessen the fear generated by that risk, and thereby reduce the extent to which people are deterred from engaging in protected speech-related activity. This is the essence of the chilling effect doctrine."). *Accord Smith v. California*, 361 U.S. at 150-151.

Because it allocates the risk of error virtually evenly between the State and the defendant, the mere "preponderance" standard established for forfeiture by RICO/CRRA does not accord sufficient respect to the transcendent First Amendment interests at stake in RICO proceedings predicated on obscenity charges. To impose criminal penalties such as fines and imprisonment for obscenity violations, penalties that are less severe than the forfeiture authorized by RICO/CRRA, the State must meet the "reasonable doubt" standard, designed to resolve the risk of error and uncertainty almost invariably in the defendant's favor. *See In re Winship*, 397 U.S. 358 (1970). But to effect a forfeiture of all assets of a speech enterprise, the State must meet a far more lenient burden of proof, a burden that imposes upon the defendant a far greater risk of error. With the stakes so high—for the speech enterprise and for First Amendment values—this risk is intolerable.

The inherently vague definition of obscenity, the devastating consequences of two "violations" of the obscenity law, and the inadequacy of the procedural protections af-

[17] This Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), is not to the contrary. In *Sedima* this Court specifically reserved the issue of the proper standard of proof for *civil* RICO cases, *id.* at 491, and, more importantly, this Court was not even remotely considering what burden of proof is required by the First Amendment when government seeks massive forfeiture of a speech enterprise based on a finding of past obscenity violation.

forded defendants under Indiana's RICO/CRRA statute, each impose a chilling effect arguably sufficient to invalidate the statute. Cumulatively, the chilling effect is staggering. The would-be speaker must confront not only the difficulty of distinguishing protected from unlawful expression, but also the high risk of erroneous adjudication under the mere "preponderance" standard and the daunting risk of draconian consequences if the speaker guesses wrong or the tribunal errs. A substantial amount of constitutionally protected expression will certainly be deterred by this regulatory scheme. For this reason, as well as those set forth in Point II, *supra*, Indiana's RICO/CRRA forfeiture provision is unconstitutional when applied to predicate offenses of obscenity.

## CONCLUSION

The judgment of the Supreme Court of Indiana should be reversed.

Respectfully submitted,

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